FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 416

GENERAL ELECTRIC COMPANY,
Petitioner,

vs.

HENRY D. GREPKE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROBERT Y. KEEGAN,
1108 Fort Wayne Bank Bldg.,
Fort Wayne, Indiana,
Attorney for Defendant-Appellant.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2
Summary Statement of the Matter Involved	3
Specification of Error	5
Argument	6
Appendix A—Opinion Below	11
Appendix B—On Judgment Below	22

AUTHORITIES.

Cases.

Chesapeake and Ohio R. R. v. Martin, 288 U. S. 209	7
Moore v. Chesapeake and Ohio R. R., 340 U. S. 573	7
Pennsylvania R. R. v. Chamberlain, 288 U. S. 333	6-8
Sickles v. Graybar Electric Company, 219 F. 2d 847	6-7-8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. .....

GENERAL ELECTRIC COMPANY,
Petitioner,

vs.

HENRY D. GREPKE,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, General Electric Company, prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered July 1, 1960, affirming the judgment entered November 10, 1959, by the United States District Court for the Northern District of Indiana, upon a jury award of Five Thousand Dollars ($5,000.00) in favor of the Plaintiff, Henry D. Grepke, against the Defendant, General Electric Company.

OPINION BELOW.

The District Court filed no opinion.

The opinion of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the District Court and the dissenting opinion of Judge Duffy are not yet reported. A copy of such opinion is appended hereto.

JURISDICTION.

(a) The judgment of the United States Court of Appeals sought to be reviewed is dated July 1, 1960.

(b) The petition of the Defendant-Appellant for rehearing was denied by said Court on August 11, 1960.

(c) Under date of August 17th, 1960, the Court of Appeals entered an order staying the mandate herein until September 16th, 1960.

(d) The transfer of the action from the State Court to the United States District Court for trial was on the basis of diversity of citizenship.

(e) Jurisdiction is conferred on this Court to review this cause by Writ of Certiorari by U. S. C., Title 28, Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

(1) Did the District Court have a duty to direct a verdict for Defendant, or to enter judgment notwithstanding the Jury's verdict where there was no evidence that the adoption by Defendant in 1954 of a method for inserting weights in motors was the result of submission of an allegedly similar method by Plaintiff in 1940, particularly in view of uncontradicted, unimpeached and uncontroverted testimony that the adoption of said method was the result of independent development of such method in 1954 by an-

other; (2) Did the District Court commit reversible error in allowing the Jury to fix damages when there was no evidence of loss to Plaintiff, as alleged in his complaint, and the only evidence as to damages was an attempt to show savings of Defendant, but such evidence was totally incompetent to establish such savings.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was brought by the plaintiff, Henry D. Grepke, an employee of the defendant, General Electric Company, to recover damages for the alleged appropriation of property rights he claimed to have in a novel method for inserting the balancing weights in the armatures of electric motors. His complaint alleged that in the year 1940, he suggested such method to the defendant, General Electric Company, under its Suggestion System, but such suggestion was rejected. In the year 1954, some fourteen years later he discovered that the defendant, General Electric Company, was about to adopt a method for inserting balancing weights in the armatures of electric motors which he contended was identical to that contained in his earlier and rejected suggestion. He thereupon in November, 1954, sought to reopen his suggestion under the Suggestion System but the defendant refused to do so, advising him that rejected suggestions were retained for only a period of six years and could not be reopened unless the file in question was still available. Claiming damages in the amount of $10,000.00 as the loss of substantial sums which would otherwise have accrued to him from the "unlawful appropriation of his invention which was disclosed to the defendant in a confidential relationship and in which he had a property right," plaintiff brought suit in the Allen Superior Court No. 3 of Allen County, Indiana, whereupon the action was removed to the U. S. District Court for the Northern District of Indiana.

The defendant's answer in addition to denying any appropriation or use of plaintiff's suggestion, (1) denied that the method it currently uses for inserting the balancing weights in the armatures of electric motors is identical to that earlier suggested by the plaintiff but on the contrary its present method is dissimilar and different, further, (2) that the method it currently uses was developed as the result of the independent invention in 1953 of another employee and not as a result of any suggestion or idea disclosed to it by the plaintiff, and (3) that at the time its present method was so independently invented and adopted by plaintiff, the plaintiff's earlier suggestion possessed no novelty but was well known and readily ascertainable in the industry.

Preliminary to trial, the plaintiff sought by Motion for Summary Judgment to strike out defendant's second and third defenses as not constituting matters of defense in an action of this character but this Motion was overruled.

In the trial of the case, the Plaintiff testified that he had submitted in 1940 via the Suggestion System an idea for inserting the balancing weights in the armatures of electric motors from the top rather than the ends and that such suggestion was rejected. He testified that in 1954, he discovered another General Electric employee, James R. Pugh, working on a method for insertion of such weights from the top rather than the end and which he contended was substantially similar to the method he had suggested.

The defendant produced as witness, James R. Pugh, another employee, who testified that in 1953 he independently invented the method now employed of inserting such balancing weights from the top instead of the ends of the armatures, that he was unacquainted with Grepke at the time and had no access to or knowledge of Grepke's earlier 1940 suggestion. Significantly, the plaintiff made no attempt whatsoever to cross-examine the witness Pugh upon either

of these vital subjects! His immediate supervisory foreman under whom Grepke served in 1940 emphatically denied knowledge of Grepke's earlier suggestion or advising Pugh thereof.

The plaintiff made no contention or claim that he advised Pugh of his earlier suggestion and produced no evidence that others did so.

Upon this status of the record, the defendant, General Electric Company, moved for a directed verdict at the conclusion of the plaintiff's case and again at the conclusion of all of the evidence but the Trial Court overruled the motion in each instance and permitted the case to go to the jury which returned a verdict of $5,000.00 in favor of the plaintiff against the defendant.

The defendant thereafter moved for a judgment notwithstanding the verdict. This was similarly denied by the trial court which entered judgment on the verdict. The defendant moved for a new trial which was denied and thereafter appealed to the United States Court of Appeals for the Seventh Circuit. The errors relied on arise out of the failure of the trial court to grant defendant's motions to direct a verdict. The Court of Appeals by a two to one vote affirmed the judgment of the District Court with Judge Duffy dissenting.

SPECIFICATION OF ERROR.

The Court of Appeals erred in affirming the decision of the District Court.

ARGUMENT.

The United States Court of Appeals, for the Seventh Circuit, by divided opinion, has approved the action of the District Court in submitting to a jury, in the face of repeated motions for a directed verdict, the question of the Defendant's liability for allegedly misappropriating and utilizing the rejected idea submitted to it by an employee some 14 years prior thereto in the adoption of a new method where there was no evidence or proof whatsoever that there was conscious or wilful misappropriation of the Plaintiff's idea, such finding, if any, being based on inference only, and the inferences of copying and misappropriation being rebutted by uncontradicted and unimpeached testimony that its subsequent adoption of a similar method came about as the result of the independent inventive efforts of another employee. In doing so, the Court has ignored and disregarded the prevailing rule and precedent adopted, not only by the Supreme Court, but its previous pronouncement which may be paraphrased as follows:

> "Where Plaintiff's right of recovery depends upon the existence of facts which must be inferred and the non-existence of the facts to be inferred is established by uncontradicted and unimpeached testimony, the inference is disspelled as a matter of law."
>
> *Pennsylvania R. R.* v. *Chamberlain* (1932), 288 U. S. 333.
>
> *Sickles* v. *Graybar Electric Company* (7th Cir., 1955), 219 F. 2d 847.

Nowhere in the testimony does the Plaintiff claim that he told the ultimate inventor of his prior suggestion, that the latter had access to it, or that the parties were even ac-

quainted, the Plaintiff relying solely on inference that the ultimate inventor *could* have had access to his suggestion, and that the two methods were similar. In opposition to this "proof by inference," the Defendant produced the ultimate inventor who categorically denied that he even knew the Plaintiff, or that he had any knowledge or notice whatsoever of the Plaintiff's suggestion and who testified that the adoption of this method came solely as the result of his own independent inventive efforts. This evidence was unchallenged and unimpeached. Under these circumstances and this posture of the record, it was a question of law for the Trial Court and not for the jury as to whether there was tortious misappropriation of the Plaintiff's suggestion as claimed, and it was reversible error for the Court to refuse to direct the verdict when the Defendant directly and repeatedly challenged it to do so.

The opinion of the Court of Appeals seeks to justify the refusal of the Trial Court to direct the verdict for the Defendant by saying, "the credibility of Pugh (the ultimate inventor), and the weight to be given his testimony were questions for the jury." In so doing, the Court again ignores the rule of law expressed by this Court in *Moore* v. *Chesapeake and O. R. R.*, 340 U. S. 573, and its own pronouncement in *Sickles* v. *Graybar Electric Company* (7th Cir., 1955), 219 F. 2d 847 that:

> "While it is the Jury's function to credit and discredit all or part of the testimony, disbelief of a witnesses' testimony does not supply want of proof, nor does the possibility alone that a jury might disbelieve such testimony make the case submissible to it."

Apparently the Court felt that because the ultimate inventor was an employee of the General Electric Company he was not a disinterested witness and, therefore, it was proper to permit the jury to pass upon his credibility, even though his testimony was not contradicted or impeached.

Yet this Court has held in *Chesapeake and O. R. R. Company v. Martin*, 288 U. S. 209, that:

> "The Court is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the Defendant in the absence of conflicting proof or of circumstances justifying countervailing inferences, or suggesting doubt as to truth of his statement, unless the evidence be of such a nature as fairly to be opened to challenge as suspicious or inherently improbable * * * We recognize the general rule, of course, as stated by both Courts below, that the question of credibility of witnesses is one for the jury alone, but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt."

In sanctioning the action of the Trial Court in refusing to direct a verdict for the Defendant and in permitting the jury to speculate on the Defendant's liability, the Court of Appeals has completely ignored the rules of law announced by this Court in *Pennsylvania R. R. v. Chamberlain*, 288 U. S. 333, and its own pronouncement in *Sickles v. Graybar Electric Company* (7th Cir., 1955), 219 F. 2d 847, cited above. The Court has fixed liability without proof of scienter, or conscious wrongdoing, responsibility without knowledge or proof of an intent! The decisions in these cases cannot be reconciled with the opinion in the instant case and the Court of Appeals made no attempt to do so. As such, the decision is so diametrically opposed to the rules of law adopted by this Court as to call for an exercise of this Court's power of supervision.

In evaluating the hazards of litigation in this field, the practitioner should know whether a Plaintiff makes out a case submissible to a jury by merely producing evidence of similarity plus inferences of access and knowledge (even though the latter be disspelled by evidence which is unimpeached and uncontradicted), or whether he must go fur-

ther to sustain his burden to prove that the party to whom the suggestion was revealed consciously and knowingly took advantage of the discloser in the utilization of the ideas submitted. The decision here questioned is completely at variance on this issue with the established authority in this field and public interest demands that the rule be clarified.

As the present case illustrates, the Defendant in this type of case is virtually defenseless, unless the Plaintiff is forced to prove his case by more than inferences. It is to be pointed out that with the original suggestions destroyed and a new method adopted, any employee who years ago submitted a suggestion can claim that his suggestion was exactly like the method adopted. The proof of dissimilarity by the Defendant is impossible, for an unscrupulous Plaintiff, in describing what he submitted, would merely describe what the Defendant is now doing and attribute it to his suggestion. Therefore, it is of utmost importance that such a Plaintiff be held to the strictest legal standards in establishing a connection between his suggestion and the adoption of a new method by the Defendant.

As to the question of damages, it is to be noted that the Plaintiff's complaint alleged and proceeded upon the theory that as a consequence of "the failure, neglect and refusal of the Defendant to recognize Plaintiff's prior rights to the invention, Plaintiff has lost substantial sums of money which would otherwise have accrued to him." No attempt was made by the Plaintiff in the trial below to show "the substantial sums of money he lost" as a result of the alleged theft of his idea by the Defendant, or that he intended to sell or license its use to others. Failing to establish any damages upon the theory pleaded in the complaint, the Plaintiff attempted to establish damages measured by savings which the Defendant experienced upon adoption of the allegedly pilfered idea.

The evidence introduced by the Plaintiff upon this theory was inadequate and fatally defective in this: The employees of the Defendant in the department in question worked on a piece rate basis, that is, a wage rate was established for each unit produced, so that if an improvement in a manufacturing technique was adopted which had the effect of reducing the time required to complete a certain manufacturing step, no savings would result to the employer unless and until the wage rate payable for each unit produced was reduced proportionately. Therefore, in order to determine the savings to the employer from the adoption of a new method, it is imperative to know when and how much wage rates per unit were reduced and there was literally no competent evidence from which the Jury could determine that as a result of the adoption of the new method wage rates per unit were reduced. This question was raised directly on the motion for a directed verdict which the Trial Court overruled.

WHEREFORE, your Petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Court of Appeals for the 7th Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court had in the case numbered and entitled on its docket, No. 12956, Henry D. Grepke, Plaintiff-Appellee *vs.* General Electric Company, Defendant-Appellant, to the end that said cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Court and for such further relief as to this Court may seem proper.

ROBERT Y. KEEGAN,
1108 Fort Wayne Bank Bldg.,
Fort Wayne, Indiana,
Attorney for Defendant-Appellant.

Dated September 6th, 1960.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 12956 SEPTEMBER TERM, 1959 APRIL SESSION, 1960

HENRY D. GREPKE,
Plaintiff-Appellee,
vs.
GENERAL ELECTRIC COMPANY, a corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

July 1, 1960.

Before DUFFY, SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* This action was brought by plaintiff, Henry D. Grepke, an employee of defendant, General Electric Company, a corporation, to recover damages for its alleged appropriation of property rights he claimed to have in a novel method for inserting the balancing weights in the armatures of electric motors. After trial before a jury, a verdict for plaintiff for $5,000 damages was returned. Judgment on the verdict was entered and defendant has appealed. Defendant relies for reversal on the failure of the trial court to grant its motions to direct a verdict, one such motion having been made at the conclusion of the plaintiff's case and another at the conclusion of all of the evidence. Defendant also moved unsuccessfully for a judgment notwithstanding the verdict.

There is competent evidence in the record tending to prove, *inter alia*, the facts which we now set forth.

Plaintiff had been employed by defendant for over 33 years, including 1940 to 1959, when he worked as an armature balancer in the Finishing Armature Section of the Series or Specialties Motors Department 401, in Division 1, Building 4, on the third floor of defendant's Fort Wayne, Indiana, plant. In 1940, William Wickliffe was a supervisor or foreman in said Division 1.

In 1940 plaintiff conceived what he believed to be a new and novel method for balancing an armature by the way he inserted balancing weights therein, which idea he submitted to defendant in accordance with a suggestion system which it maintained, while a confidential relationship existed between them.

The operation of the suggestion system was as follows: Ideas received found their way to a suggestion office where they were typed up, assigned a number and "acknowledged". That office filed the original typed copy and a duplicate typewritten copy was sent to a secretary of a subcommittee within a particular section or department where the suggestion would be expected to be used. This subcommittee normally consisted of men similar to a cost reduction man, a cost accountant, or a cost man, a time study man, generally a general foreman and an engineer or a planning engineer. The subcommittee in the department normally passed on whether the idea would be used and made the reward or referred the matter to a "central committee" composed of three or four additional men. If the subcommittee did not return the typed duplicate copy to the suggestion office within some several weeks, it was notified, but there were no regulations that prevented the subcommittee from creating its own files or records of ideas. If any "problems" arose, or if the person originat-

ing the idea requested it, the invention would then be reviewed by the secretary and a central committee. In some instances inventions would be referred to an "overall committee" at Schenectady, New York, or to a planning engineer or planning people employed in the Fort Wayne plant to improve motors, but no record was kept when that was done. Such planning people would also have access to the original ideas on file upon request, and they sometimes kept a separate file or group of ideas for future reference and no record was kept when this was done. In 1953 all suggestion records were turned over to and kept by the department to which they would have been referred. However, since 1947 it was customary to destroy after six years the suggestion records except a log book.

Plaintiff submitted his idea to the foreman and, under date of November 19, 1940, the committee on suggestions acknowledged receipt thereof and assigned a number to the suggestion. Defendant rejected plaintiff's idea and notified him accordingly. His idea was to insert balancing weights from the top of armatures. Under the old method, balancing weights were inserted from the end of armatures and this method continued until 1953. In that year, foreman Wickliffe determined that a large number of armatures were damaged and rejected as a result of the use of the old method. Wickliffe then assigned the task of finding a different way to balance armatures to one John Pugh, who had been a foreman in training under Wickliffe for some six months in the same Department 401, in Division 1, and later became a "motion time survey specialist".

In April 1953, Pugh submitted a "cost improvement project", consisting of a method of balancing armatures, which was placed in production in 1954.

Pugh, as a witness for defendant, testified that in 1953

he independently invented the method now employed by defendant, that it consisted in inserting the balancing weights from the top instead of the ends of armatures, and that he was unacquainted with Grepke at the time and had no access to or knowledge of Grepke's earlier 1940 suggestion.

Defendant's instruction No. 1, which was given by the court to the jury, reads:

> The Plaintiff Henry Grepke's complaint alleges that in 1954, the Defendant General Electric Company in effect utilized a novel method for inserting balancing weights in the armatures of electric motors that was identical to the method previously suggested to it by the Plaintiff in 1940. By its answer, the Defendant General Electric Company denies that the methods are similar but on the contrary, claims that its present method of so inserting such balancing weights is entirely dissimilar and different from that suggested by the Plaintiff. You are instructed that the burden of proving such methods are substantially equivalent or similar is upon the Plaintiff, and if you find from a fair preponderance of the evidence that such methods are not substantially equivalent or similar and that the Defendant's present method differs in material respects from that suggested by the Plaintiff, you should find against the Plaintiff and for the Defendant, General Electric Company.

1. Was Pugh's alleged invention in 1953 an appropriation of plaintiff's suggestion to defendant in 1940? Under proper instructions, to which no objection by either party was made, the jury in effect answered this controlling question in the affirmative. Defendant focused the attention of the jury upon the issue between the parties as to whether plaintiff's method and Pugh's method were substantially similar or equivalent, by defendant's instruction No. 1, and the jury by its verdict for plaintiff thereby found that issue against defendant.

We might add that this court in *Smith* v. *Dravo Corp.*, 203 F. 2d 369, 377, said:

> "As a general rule the similarity standing alone is an adequate basis upon which to find misappropriation. Thus, in *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 4 Cir., 80 F. 2d 912, 924, the court said:
>
> > 'The similarity of defendant's device to that of complainant is strong proof that one was copied from the other'."

It is important to note that there is no question raised on this appeal as to the new and novel nature of plaintiff's idea or as to the existence of a confidential relationship between plaintiff and defendant. Plaintiff's idea was at all times in possession of defendant from and after 1940. Moreover, Pugh worked for plaintiff's foreman, Wickliffe, he had conversation with that foreman concerning the balancing of armatures, he had access to the files, and he worked in the same building, division and department as plaintiff.

As the court said in *Golding* v. *R. K. O. Pictures*, 221 P. 2d 95, 98, 35 Cal. 2d 690 (1950):

> "• • • Was the plaintiff's material copied by the defendant? There will seldom be direct evidence of plagiarism, and necessarily the trier of fact must rely upon circumstantial evidence and the reasonable inferences which may be drawn from it to determine the issue. An inference of copying may arise when there is proof of access coupled with a showing of similarity. • • • Where there is strong evidence of access, less proof of similarity may suffice. • • •"

In *Bowles* v. *Zimmer Mfg. Co.*, F. 2d , No. 12804, we said, in discussing the defendant's motion for a directed verdict:

> "On such a motion, it is the duty of the court to consider the evidence in the light most favorable to plaintiff and to consider as proven facts those which

the evidence tends to prove, drawing against the party requesting a directed verdict such inferences as the jury might reasonably draw from the evidence. *Johnson* v. *Gough's Estate*, 125 Ind. App. 518, 124 N. E. 2d 704 (1955); *Hammerbacher* v. *Babchenko*, 348 Mich. 139, 82 N. W. 2d 456 (1957)."

Defendant argues:

"The only way the jury could possibly fix liability on the defendant for the misappropriating and stealing of Grepke's suggestion would be to speculate that Pugh somehow and in some manner was told about the Grepke suggestion and utilized the same rather than that he developed his method by his own inventive efforts. Under the established rules of law, such conjecture and speculation cannot be indulged in and in the face of the positive denial of such fact by unchallenged evidence, the Trial Court should have accepted its responsibility and directed a verdict for the defendant as a matter of law."

However, in *Lavender* v. *Kern*, 327 U. S. 645, the court made it clear that a jury may draw inferences from the evidence. The court, at 653, said:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Moreover, the credibility of Pugh and the weight to be given to his testimony were questions for the jury. We are not impressed with the contention of defendant that Pugh was a disinterested witness. His relation to defendant and the effect of the outcome of this case upon his claim that he was the inventor of a valuable method cast considerable doubt upon any contention that he lacked interest in this litigation. Nor was the jury required to believe Pugh's testimony which was to the effect that he had no knowledge of plaintiff's method, especially as there was evidence that he had opportunities for access to the suggestion which plaintiff in confidence had given to defendant. We do not consider fatal to plaintiff's case that the period from 1940 to 1953 elapsed before defendant openly appropriated plaintiff's idea. It is common knowledge that, during most of that period, the United States was engaged in wars and that manufacturers such as defendant were preoccupied in assisting the government in its war effort, leaving little opportunity for development of new ideas.

We cannot say that on the entire record the court had a duty to direct a verdict in favor of defendant or to enter judgment notwithstanding the jury's verdict.

2. Defendant argues that the evidence shows that in 1954 the method of inserting balancing weights from the top of armatures instead of from the end was well-known in the industry. It therefore concludes that the alleged misappropriation by defendant of plaintiff's suggestion, disclosed in confidence and in which he had a property right, disappeared as a matter of law.

This position is unsound. If, as the jury evidently believed from the evidence, defendant in 1940 solicited and obtained in confidence plaintiff's idea and in 1953 Pugh appropriated that idea for defendant's benefit, we consider irrelevant the alleged fact that in 1954, or even

before then, from sources other than plaintiff, a similar method had been adopted in the industry. Certainly defendant does not contend that Pugh resorted to general knowledge in the industry in reaching the result which he claimed to have achieved in 1953.

In *Smith* v. *Dravo Corp.*, 203 F. 2d 369, 375, we said, quoting from Nims, Unfair Competition and Trade Marks, sec. 148:

> "The fact that a trade secret is of such a nature that it can be discovered by experimentation or other fair and lawful means does not deprive its owner of the right to protection from those who would secure possession of it by unfair means."

3. Defendant contends that "there was a complete absence of credible evidence to sustain a verdict for $5,000 in damages". We note the obvious ambiguousness of this language. While defendant in the district court attacked the verdict by a motion for a new trial, which was overruled, no reversal is sought in this court upon the overruling of that motion. It is upon a motion for a new trial that defendant might have properly made its argument that the amount of the verdict was excessive or that the evidence of damages was not credible. But no ruling upon defendant's motion for a new trial is before us now. As we have pointed out, in this court defendant relies for reversal on the trial court's failure to grant its motions to direct a verdict in its favor. On such motions the credibility of evidence and the effect or weight thereof cannot be decided. *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Twin City Hardwood Lumber Co.* v. *Dreger*, 199 F. 2d 197, 198. On the record before us we would be limited to the question (if raised by defendant) of whether there is a failure of *any* evidence that plaintiff was damaged. Only if defendant raised that question and if we find in defendant's favor on that question, can we say that the

district court erred as a matter of law in overruling defendant's motions for a directed verdict and for judgment notwithstanding the verdict.

On behalf of himself, plaintiff testified to facts which we now summarize.

In the Fort Wayne plant in 1954, 1955, 1956 and 1957, an estimated 10,000 armatures per week were processed, of which 30% utilized the plaintiff's idea. Two thirds as many per week were produced in 1958 of which 30% used his method and 5,000 were produced per week in 1959, of which 40% utilized that method. Cost and time studies of the new method showed a savings of 2.28 minutes for each 5 armatures on one model, a time savings of 1.13 minutes for armatures of another model, and a time savings of .86 a minute per armature on another model. Rates paid to employees for this work were reduced accordingly. The motions savings represented by the invention amounted to 12 seconds per weight used in an armature, premised upon the elimination of at least 6 motions by the new invention. During the time involved, an average of some six to eight weights were inserted in each armature and persons doing this work were paid $2.60 to $2.85 per hour.

The attorney for defendant told the court that the defendant "• • • knew perfectly and accurately • • • how much was paid on each one of these armatures • • •", what the hourly rates were and presumably therefore the exact savings, which information was not in the possession of plaintiff. The record also shows that he stated "• • • that the defendant, in the absence of a jury, certainly could have proved the value of the idea to the defendant • • •." Defendant, however, chose to rely entirely on the testimony of plaintiff and offered nothing to that effect.

In *A. C. Becken Co. v. Gemex Corporation*, 272 F. 2d 1, 5, we said:

"We do not consider that the proof of damages offered by plaintiff was speculative in nature and that it is impossible to contend that plaintiff has been damaged by the action taken by defendant, as the latter contends. Rather, we think, that there was no speculation as to the fact of actual damage and that plaintiff's business was seriously curtailed by the cut-off by defendant. It is not the law that the defendant who caused the damage can be permitted to escape liability because it is difficult for plaintiff to express in terms of dollars the damages it has suffered. *William H. Rankin Co.* v. *Associated Bill Posters*, 2 Cir., 42 F. 2d 152, at page 155, where the court said:

> "* * * This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never actually earned because of the defendants' wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony. * * *"

"The district court was led into error in finding as a fact and concluding as a matter of law that plaintiff was not damaged as a result of defendant's conduct. Damage was proved. * * *"

In the case at bar the evidence proves that plaintiff was damaged by defendant's appropriation of his idea. The action of the district court in overruling defendant's motion for a new trial is not before us for review. No error was committed in the denial of defendant's motions now under review.

We find no error in this record and the judgment of the district court is affirmed.

AFFIRMED.

DUFFY, *Circuit Judge*, dissenting.

The burden was upon the plaintiff to prove that the adoption by defendant in 1954 of the method of inserting balancing weights was the result of copying plaintiff's suggestion made some thirteen years prior thereto. In my judgment, there was a complete failure on plaintiff's part to meet the burden which was upon him.

If other employees of defendant, without knowledge of plaintiff's earlier suggestion, hit upon the same idea, and defendant adopted same, there would be no liability on the part of the defendant. Also, if defendant adopted in 1954 an idea from a practice then well established in the industry, again there would be no liability. It seems clear that for liability to attach, defendant must have knowingly misappropriated plaintiff's suggestion made thirteen years earlier. In my view, the motion for a directed verdict should have been granted.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago 10, Illinois.

Friday, July 1, 1960.

Before:

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Win G. Knoch, Circuit Judge.

HENRY D. GREPKE, *Plaintiff-Appellee,* vs. GENERAL ELECTRIC COMPANY, a corporation, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 12956	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Fort Wayne Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, and interest from the date of judgment of the said District Court until paid, at the same rate that similar judgments bear in the courts of the State of Indiana, in accordance with the opinion of this Court filed this day.

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 1 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 416

GENERAL ELECTRIC COMPANY,

Petitioner

vs.

HENRY D. GREPKE,

Respondent

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

See Rothert,
1700 Lincoln Bank Tower,
Fort Wayne 2, Indiana,
Attorney for Respondent

THE GUNTHORP WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented for Review	2
Summary Statement of the Matters Involved	2
Specifications of Error	5
Argument—	
A. The Weight to Be Given Pugh's Testimony Was Appropriately Left to the Jury	6
B. The Court Properly Refused to Direct a Verdict, as Evidence Exists in Support of the Plaintiff's Prima Facie Case	9
C. The United States District Court for the Northern District of Indiana and the Circuit Court of Appeals Properly Determined the Authorities Cited by the Petitioner Are Not Controlling	11
D. There Is Evidence of Damages, the Amount of Which Was Properly Left for the Jury	14
E. No Grounds Are Set Out for the Exercise of This Court's Supervisory Jurisdiction	16

AUTHORITIES.

Supreme Court Rule 19(1)(b) 2, 14, 17

Cases.

Ackerman v. General Motors Corp., 202 F. (2) 642 (4th Cir. 1953), Cert. Den. 345 U. S. 966, Reh. Den. 346 U. S. 842 ..... 6, 7

Adamson v. Gilliand, 242 U. S. 350 (1916) 6

Barbed Wire Patent, The, 143 U. S. 275 (1891) 6

Becker, A. C., Co. v. Gemex Corporation, 272 F. (2) 1 (7th Cir. 1959), Cert. Den. 382 U. S. 864 ..... 15, 16

Booth v. Stutz Motor Car Co., 24 F. (2) 416 (7th Cir. 1927) 10, 15

Carter v. John Hennes Trucking Co., 210 F. (2) 443 (7th C. C. A. 1953) 11

DuPont v. Masland, 244 U. S. 100 (1917) 16

Golding v. R.K.O. Pictures, 221 P. (2) 95, 35 Calif. (2) 690 (1950) 8, 10

Hoeltke v. C. M. Kemp Mfg. Co., 80 F. (2) 912 (4th Cir. 1935), Cert. Den. 298, U. S. 673 ..... 7, 9, 15

Lavender v. Kurn, 327 U. S. 645 (1959) 18

Maltrese v. Moore-McCormack Lines, 158 F. (2) 631 (2nd Cir. 1946) 16

Milachak v. American Dredging Co., 266 F. (2) 873 (3rd Cir. 1959), Cert. Den. 361 U. S. 901 11

Shellmar Products Co. v. Allen Qualley, 87 F. (2) 104, 36 F. (2) 623, 31 F. (2) 293 (7th Cir.), Cert. Den. 301 U. S. 695 ..... 7, 16

Smith v. Dravo, 203 F. (2) 369, 208 F. (2) 388 (7th Cir.) 9, 16

Smith, A. O., Corp. v. Petroleum Iron Works, 74 F. (2) 935 (6th Cir. 1935) 7

Ulman v. Thompson, 57 Ind. App. 126, 106 N. E. 611 (1914) 16

Secondary Authorities.

Annotation 16 A. L. R. 117 17

Annotation 32 A. L. R. 1037 17

Annotation 44 A. L. R. 593 16

Annotation 85 A. L. R. 1512 16

Annotation 153 A. L. R. 983 16

Annotation 170 A. L. R. 444, 449 16

Annotation 63 A. L. R. (2) 1191, 1199 11

21 Am. Jur., Sec. 1180, p. 1030

Wigmore, The Law of Evidence, § 587 and § 2495 11

Petitioner's Cases Cited.

Chesapeake and Ohio R. R. v. Martin, 288 U. S. 209 (1931) 12, 13

Moore v. Chesapeake and Ohio R. R., 340 U. S. 573 (1951) 12, 13

Pennsylvania R. R. v. Chamberlain, 288 U. S. 333 (1932) 11, 12

Sickles v. Graybar Electric Company 219 F. 2d 847 (7th Cir. 1955), Cert. Den. 350 U. S. 827, Reh. Den. 350 U. S. 905 ..... 12, 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 416.

GENERAL ELECTRIC COMPANY,

Petitioner,

vs.

HENRY D. GREPKE,

Respondent.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Respondents respectfully pray that the Court deny the Petition for Writ of Certiorari to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit affirming the jury verdict in favor of the plaintiff in the District Court for the Northern District of Indiana.

OPINION BELOW.

The opinion below is not yet officially reported, but is as appears in the petitioner's appendix.

JURISDICTION.

The respondent accepts the petitioner's statement of jurisdiction.

QUESTIONS PRESENTED FOR REVIEW.

The respondent is not satisfied the proposed statement of the issues presented by the petitioner are accurate, but would re-state them as follows:

(1) Whether the uncorroborated testimony of an interested third person and employee, Mr. Pugh, that he subsequently independently conceived the invention, requires a directed verdict consistent with the affirmative defense of independent invention, or whether this is a question upon which reasonable men may differ.

(2) Whether there was a complete absence of credible evidence on damages, or whether the evidence and the inferences reasonably made therefrom were sufficient to support a jury verdict of $5,000.00?

(3) Have the Circuit Court of appeals and the District Court decided an important State or Territorial question in a way in conflict with the state or territorial law or so far departed from the acceptable and usual course of judicial procedures as to call for an exercise of this Court's supervision? Rule 19 (1)(b).

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The Statement of Facts included in the petition are incomplete and in certain particulars at variance with the transcript. Also, the petitioner implies omissions of testimony where testimony in fact existed on particular points. For a more accurate analysis of the transcript of evidence the Court is respectfully referred to the Opinion of the Circuit Court of Appeals, reported in full in the Appendix to the Petitioner's Brief.

At Page 3 of his brief, the petitioner suggests this case is important in that the operation of the "Suggestion

System of General Electric Company" was passed upon. Such was not the case. Although a "suggestion system" was made reference to on several occasions, there was neither an attempt to introduce it in evidence, introduce it into the pleadings, nor to determine its legal effect; the facts assume no written contract or agreement existed limiting the rights of the parties as is oftentimes known to occur in industry. It was assumed throughout the trial and on appeal that there was no written or oral agreement and the case was not controlled by any "suggestion rules." The existence and the legal effect of such a system is, therefore, not a question before the Court.

At Pages 3 and 4 of the brief, the petitioner suggests that for the plaintiff to recover, it was encumbent upon him to prove the method adopted by General Electric Company was "identical" to the plaintiff's invention. Such was not the case. The test was properly set out, and presented to the jury in defendant's Instruction Number 1, to-wit:

> "You are instructed that the burden of proving such methods are substantially equivalent or similar, is upon the plaintiff, and if you find from a fair preponderence of the evidence that such methods are not substantially equivalent or similar, and that the defendant's present method differs in material respects from that suggested by the plaintiff, you should find against the plaintiff and for the defendant, General Electric Company."

At Page 4 of his brief, the petitioner suggests the plaintiff testified his invention consisted simply of inserting balancing wedges from the top rather than the side. In fact, the plaintiff's description of the invention submitted and the description of that adopted by the General Electric Company was far more detailed. The weights had to be clipped on one side (R. 48, 62, 239), filed or rounded off or

bevelled (R. 48, 62, 239) in order to fit into the armature and snap into the corner of the slot when staked with a staking tool (R. 48, 62, 239). It was this invention which the jury found to be the same or substantially equivalent to that used by the defendant (R. 200-201).

Mr. Pugh, of course, testified he did not depend on any invention in possession of his principal. But the implication at Page 5 of the petitioner's brief, that Mr. Pugh's testimony was corroborated, is inaccurate. His supervisor did not corroborate him, but stated simply that he did not recall discussing the invention with either Mr. Grepke or Mr. Pugh (R. 230, 231). He did admit that he was the plaintiff's foreman in 1940, and that he had passed upon inventions in that capacity (R. 232). It was true, that there was testimony certain files were destroyed by the defendant, but it was further testified to that in 1953, prior inventions were turned over to departments in which they could be expected to be used (R. 34). In 1953 Mr. Pugh and Mr. Wickliffe were both in the very department where this invention was finally used (R. 199, 229).

The whole of the petitioner's argument at pages 6-9 of his brief, is premised on the supposition there lacked proof of access. Such was not the case. It was established that in 1953, the year Mr. Pugh was working on the invention, all old inventions were referred to the respective departments where the invention would be used (R. 34). There seems no question that an invention concerning armature balancing would have been sent to Mr. Pugh's department, the Armature Balancing Department, finishing armature section, Department 401, Division 1, Building 4 (R. 199, 229). The defendant-employee in charge of the files testified that "planning men or engineers" had "access" to files if they requested it (R. 23, 24, 32). Planning people, spotted around in different departments, would sometimes put "good ideas" away "somewhere for future reference"

(R. 33, 37). It was only the use of these available avenues which was denied by Mr. Pugh, not the existence of the avenues or the access. In fact, it is difficult to see how access could have been more definitely proven and established. The invention was at all times in possession of the defendant and the question of access to it was properly for the jury.

SPECIFICATIONS OF ERROR.

The petition raises no question concerning the existence of the communication, the new and novel nature of the invention, the existence of a position of confidence, the expectation of compensation, and the substantial similarity of the invention communicated and that used, all of which questions were previously raised. This argument, therefore, is limited simply to the questions raised, Pugh's testimony and the damages, concerning which neither the District Court nor the Circuit Court of Appeals erred.

ARGUMENT.

A. The Weight to Be Given Pugh's Testimony Was Appropriately Left to the Jury.

Pugh orally testified that he independently invented the invention which the jury found to be substantially similar to the plaintiff's. No documentary evidence was introduced. Pugh was an employee of the defendant, interested by the fact that he claimed prior inventive rights over the plaintiff. As the person claiming to have conceived the new invention, having already presumably been compensated for it, and still employed as a cost improvement expert, he was an interested party in the outcome of the litigation about whose testimony reasonable men might quite logically differ. His testimony, therefore, submitted as a part of an affirmative defense by the defendant was for the jury. The rule is clear that where a defendant seeks independent invention by oral testimony, the proof sustaining it must be clear and satisfactory, and he ought to offer something of greater weight than verbal testimony of interested witnesses.

Adamson v. *Gilliand*, 242 U. S. 350 (1916).

The Barbed Wire Patent, 143 U. S. 275 (1891).

> "The defendant contends that it should not be held liable for damages for breach of the confidential disclosure, because it says that its construction was the result of independent effort on the part of its employees and was not derived from the disclosure by the plaintiff; there is evidence on the part of employees in support of this contention; but this evidence is not convincing * * *" *Ackerman* v. *General Motors Corp.*, 202 F. (2) 642 (4th Cir. 1953), Cert. Den. 345 U. S. 966, Reh. Den. 346 U. S. 842.
>
> "It is well settled, that where an unpatented device,

the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory and beyond a reasonable doubt.

"And we think the same rule should be applied against one who admittedly receives a disclosure from an inventor, proceeds thereafter to manufacture articles of a similar character, and when called to account, makes answer that he was using his own ideas and not the ideas imparted to him." *Ibid.*, 202 F. (2) at p. 648.

"What was said by the Supreme Court in *Atlantic Works* v. *Brady*, 107 U. S. 192, 203, 2 S. Ct. 225, 234, 27 L. Ed. 438, when dealing with the contention of one Brady that he was the inventor * * * is applicable to the testimony of employees of the defendant, viz: 'Interested as he is in the result of the suit, his testimony cannot be allowed to prevail against a course of conduct so utterly at variance with it'." *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. (2) 912, 923, 4th Cir. 1935, Cert. den. 298 U. S. 673.

"One who invites the disclosure of an invention and thereafter begins to manufacture articles embodying the principal of the disclosure, labors under a heavy burden when he seeks to justify his action on the grounds of independent invention and he ought to offer something of greater weight than verbal testimony of interested witnesses" *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. (2) at p. 923.

Shellmar Products Co. v. *Allen Qualley*, 87 F. (2) 104, 36 F. (2) 623, 31 F. (2) 293 (7th Cir.), Cert. Den. 301 U. S. 695.

A. O. Smith Corp. v. *Petroleum Iron Works*, 74 F. (2) 935 (6th Cir. 1935).

The defendant's second affirmative defense is that of independent invention. In support of this defense, Pugh testified and denied use of the prior invention communicated to his employer. Throughout the trial, and on various motions, defendant has consistently argued that this testi-

money must be accepted as a matter of law. That it has long been recognized that such testimony does not take the trier of fact from the jury as to the question of the plaintiff's priority.

> "There will seldom be direct evidence of plagarism and necessarily the trier of fact must rest upon circumstantial evidence and the reasonable inference which may be drawn from it to determine the issue."
>
> "Defendants deny access and copying. Access may, however, be proved indirectly. A charge of piracy does not fail merely because the infringer was not caught in the act of copying. Access may be inferred from surrounding circumstances or it may be found from similarities in plan arrangement and combination of materials, or from identity of phraseology or from other evidentiary facts * * * The weight given the inference against direct evidence of non-access or non-copying is a question for the trier of fact." *Golding v. R. K. O. Pictures*, 221 P. (2) 95, 35 Calif. (2) 690 (1950) at 98, and see case cited *supra* at pp. 6 and 7.

Under these circumstances, it was entirely appropriate that the question involved be presented to the jury. If anything, one might argue that the motion could be directed against such testimony. That position is not necessary, however, as it is sufficient to say that the proof of access as it exists in the transcript of evidence, together with all other surrounding circumstances, including the degree of interest on behalf of Pugh, constitutes an issuable fact for the jury. It is important to note that the record not only contains this minimal amount of evidence necessary to present an issuable fact under the law, but the record additionally substantiates a great degree of identity between the invention adopted and that submitted, coupled with the similarity of the material used in experimentation (R. 62, 199), and the identical experience of both inventors in overcoming common obstacles (R. 67, 205).

B. The Court Projerly Refused to Direct the Verdict As Evidence Exists in Support of the Plaintiff's Prima Facie Case.

The verbal denial by Pugh of the use of the plaintiff's prior invention is given in support of the second affirmative defense and is not a part of the plaintiff's *prima facie* case. Thus, to reach the question presented, it must be admitted that the plaintiff has met the burden of establishing his *prima facie* case. The true position of the defendant is, therefore, that although the plaintiff established his *prima facie* case, the Court should have directed a verdict of the second affirmative defense alleged in the defendant's answer. But the Court properly refused to do so because, at best, this testimony creates only a conflict of the evidence as to whether the inventions were the same.

> "* * * (sets out) * * * the general picture of an action of this nature, holding the essential elements to be; (1) the existence of the trade secret, (2) communicated to the defendant in confidence, (3) while he is in a position of trust and confidence, and (4) the use by the defendant to the injury to the plaintiff." *Smith* v. *Dravo*, 203 F. (2) 369, 373, 208 F. (2) 388 (7th Cir.).
>
> "As a general rule, the similarity standing alone, is an adequate basis upon which to find misappropriation." *Ibid.*, 203 F. (2) at p. 377.
>
> "If there is any disadvantage that he knew the plaintiff's secrets, he must take the burden with the good." *Ibid.*, 203 F. (2) at p. 376.
>
> "The similarity of the defendant's device to that of the complainant is strong proof that one was copied from the other." *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. (2) 912, 924 (4th Cir. 1935), Cert. Den. 298 U. S. 673.
>
> "* * * Liability for damages must rest upon substantial evidence of similarity between the plaintiff's literary property and the moving picture produced by

the defendant." *Golding* v. *R.K.O. Pictures*, 221 P. (2) 95, 35 Calif. (2) 690 (1950).

Booth v. *Stutz Motor Car Co.*, 24 F. (2) 416 (7th Cir. 1927).

It must be remembered this is an action against the defendant General Electric Company for the use of the plaintiff's invention contrary to the confidential relationship and is not an action against Pugh for intentional misappropriation. Thus, the gist of the action is the use of the plaintiff's invention in breach of the confidence, not an intentional wrongdoing or misdeed by Pugh. The sole question relating to Pugh as to whether his employer is entitled to have his affirmative defense sustained as a matter of law by reason of this oral testimony, or whether this testimony by Pugh that he in fact invented the invention, not Grepke, was for the jury.

The trial court had an opportunity to consider this question on the defendant's numerous motions, after having observed the demeanor of the witness, determined the extent of his interest and bias, and the probability and degree of his financial interest in the outcome of the case. The force of Pugh's testimony was carefully reviewed in the briefs, on appeal and in the prior arguments, and each time the existence of an interest on behalf of Pugh in the outcome of the litigation has led the Court to the only fair result—that his testimony was a part of the trier of the facts to the jury.

"The jury are not bound to believe anything to be a fact simply because a witness has stated it to be so, provided that the jury believes the witness was mistaken or testified falsely.

"It does not necessarily follow, however, that a verdict or finding must be in favor of the party introducing uncontradicted testimony, especially if such testimony discloses a variety of circumstances from which

different minds may reasonably arrive at different conclusions as to the ultimate facts, or if the uncontradicted testimony is that of an interested witness."

Carter v. *John Hennes Trucking Co.*, 210 F. (2) 443, 447 (7th C. C. A. 1953).

"Here, adequate reason for leaving the question of credibility to the jury lay in the fact that the chief witness had an obvious interest in the case * * *" *Milachak* v. *American Dredging Co.*, 266 F. (2) 875, 878 (3rd Cir. 1959), Cert. Den., 361 U. S. 901. 20 Am. Jur., Sec. 1180, p. 1030.

Annotation, Credibility—Court or Jury Question, 62 A. L. R. (2) 1191, 1199.

And see cases collected in Wigmore, The Law of Evidence, Sec. 587 and 2495 to the effect that the trial judge's preliminary determination of interest or bias should not be disturbed on appeal.

C. The United States District Court for the Northern District of Indiana and the Circuit Court of Appeals Properly Determined the Authorities Cited by the Petitioner Are Not Controlling.

The petitioner says, "the prevailing rule and precedent" is "ignored". Pet. Brief, p. 6. Presumably the petitioner intends to fit under the provisions of Rule 19 (1)(b), providing for the discretionary exercise of certiorari when the Circuit Court of Appeals has decided an important State question in a way in conflict with applicable state law. If this is so, no proper question is presented by the petition for writ of certiorari because not one Indiana case is cited in the petitioner's brief. Even if the decisions cited were applicable in Indiana, which they are not, it is difficult to see how they would be controlling. The cases are cited as follows:

Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333 (1932), by Mr. Justice Sutherland re-

versing 49 F. (2) 986 (2nd Cir. 1931), and thereby affirming the trial court.

Chesapeake & Ohio Railroad v. *Martin*, 283 U. S. 209 (1931), by Mr. Justice Sutherland.

Moore v. *Chesapeake & Ohio Railroad Co.*, 340 U. S. 573 (1951), an opinion by Mr. Justice Minton affirming, 184 F. (2) 176 (4th Cir. 1951), and thereby affirming the trial court.

Sickles v. *Graybar Electric Co.*, 219 F. (2) 847 (7th Cir. 1955), Cert. Den. 350 U. S. 827, Reh. Den. 350 U. S. 905 (1955).

Each of the cases has been urged in both the trial Court and the Circuit Court of Appeals on at least three occasions each and on no occasion did either Court think them applicable. The reasons are obvious.

Pennsylvania Railway Co. v. *Chamberlain*, *supra*, was an action for damages for negligence. The brakeman plaintiff had evidently fallen from a freight car and been killed. The theory was that defendant's employees negligently caused a string of freight cars to collide, which caused the fall. "Three witnesses * * * corroborated by every other employee in a position to see all testified there was no contact." 288 U. S. at 336.

> "The plaintiff's only witness * * * professed to have paid little attention to what went on * * * heard what he described as a loud crash * * * not, however, an unusual event in the switching yard." 288 U. S. at 366, 367.

The trial judge thought the plaintiff had not made out his *prima facie* case, by failing to prove a collision occurred, and directed a verdict. Judge Learned Hand thought the question should have been submitted to the jury on inferences of a collusion from the crash, but this Court thought otherwise and sustained the trial judge's determination

that the *prima facie* case had failed and the question could be taken from the jury.

Moore v. *Chesapeake & Ohio Railway Co., supra*, was an action for negligence under the Federal Employers' Liability Act. The brakeman plaintiff had evidently fallen from a freight car and been killed. The theory was that defendant employees negligently made a sudden and unexpected stop which caused the fall into the path of an oncoming train.

> "The engineer was the only witness to the accident and was called to testify for the petitioner. He testified that he saw the decedent fall from the tender and that he made an emergency stop in an attempt to avoid injuring him. He testified that he received no signal to stop, had no reason to stop until he saw the decedent fall * * * (he) * * * never waivered in his testimony * * * (and) * * * all the evidence shows is that the decedent fell before the train stopped." 340 U. S. at 575, 6, 7.

The trial Court thought the plaintiff had not made out his *prima facie* case by failing to prove negligence. Both the Circuit Court of Appeals and this Court agreed that the trial judge could properly remove the question from the jury.

Chesapeake & Ohio Railway v. *Martin, supra*, was an action for damages for negligent and unreasonable delay. But there was no testimony that the delay was unreasonable and, therefore, the plaintiff failed in his *prima facie* case and the matter was removed from the jury.

Sickles v. *Graybar Electric Co., supra*, was an action for damages for negligence. The plaintiff carpenter had fallen from scaffolding and been injured. The theory was that defendant's employees negligently moved the scaffolding into a position of peril. There was, however, no evidence the defendant's employees had touched or been near the

scaffolding and therefore, again, there was no proof of negligence and the matter could have been taken from the jury.

Each case is an action for damages for negligence in which the plaintiff failed to prove negligence on the part of his *prima facie* case; ours is an action for the appropriation of a property right in an invention disclosed in confidence and is an entirely dissimilar case. Each case involves the question of whether the plaintiff has made out his *prima facie* case; the argument here must concede the plaintiff has made out his *prima facie* case, and only argues that a motion should have been directed after the defendant's testimony. The only question the petitioner urges is whether the defendant has sustained his second affirmative defense as a matter of law, the burden of which rests upon the defendant, not the plaintiff. None of the cases even intimate that the uncontradictable evidence of an interested witness in support of an affirmative defense must be accepted as a matter of law. In none of the cases is there any conflicting evidence at all, such as the evidence here is conflicting concerning the question of having access and the substantial similarity of the earlier invention. As the pleadings show we are dealing here with the defendant's burden, not the plaintiff's as was the question in each of these cases.

It is submitted, therefore, that none of the cases are authoritative for the proposition that an important state question has been determined in conflict with applicable state law and no appropriate showing is made under Rule 19 (1)(b).

D. There Is Evidence of Damages, the Amount of Which Was Properly for the Jury.

Discussing damages, the petitioner once again does not contend the decision is an important state question in con-

fliet with applicable law or is a departure from the accepted and usual course of judicial proceeding. Again no authority is cited. Damages are proven here in the only logical and possible way. No doubt, had the plaintiff submitted proof of the value of the invention to himself or others, the defendant would have objected just as strenuously as he objects to the present method. Like the other arguments advanced, the petitioner presents no mention of the cases relied upon by the Court. *A. C. Becker Co.* v. *Gemex Corporation*, 272 F. (2) 1, 5 (7th Cir. 1959); Cert. Den. 382 U. S. 864. Nor does he make mention of the recognized and authoritative cases involving the determination of damages in an action for the appropriation of property rights.

> "To the extent, therefore, that the Booth plan, communicated in confidence to Stutz, did enter into the design of the Stutz car, Stutz did inequitably appropriate the plans and should account to Booth therefor." *Booth* v. *Stutz Motor Car Co.*, 24 F. (2) 415 (7th Cir. 1928).
>
> "* * * the defendant ought not to be heard to say that he was in no way obligated to respect the confidence thus reposed in it." *Hoeltke* v. *C. M. Kemp Mfg. Co.*, 80 F. (2) 912, 922 (4th Cir. 1935), Cert. Den. 298 U. S. 673.
>
> "The doctrine of unjust enrichment or recovery in quasi contract, obviously does not deal with situations in which the party to be charged has by word or deed legally consented to assume a duty toward the parties seeking to charge him. Instead, it applies to situations where as a matter of fact, there is no legal contract, but only the person sought to be charged is in possession of money or property which in good conscience or justice he should not retain, but should deliver to another. (Citing cases.) Where this is true, the Courts impose a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong. (Citing cases.) The doctrine is applicable to a situation where, as here, the product of

an inventor's brain is normally received and used by another to his own great benefit without compensating the inventor. * * *

"The evaluation of this evidence was, of course, for the jury * * * 'the judge properly charged that recovery must be based upon reasonable value of the use of the devices and the reasonable value of the services rendered by the plaintiff * * *.

"Records containing this information were, of course, in possession of the defendant. Plaintiff did, however, prove the fact of damages; and the amount of damages could be determined as a matter of just and reasonable inference from the plaintiff's evidence." *Maltrese* v. *Moore-McCormack Lines*, 158 F. (2) 631, 634, 635 (2nd Cir. 1946).

"It is not the law that the defendant can be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars, the damage it has suffered." *A. C. Becker Co.* v. *Gemex Corp.*, 272 F. (2) 1, 5 (7th Cir. 1959), Cert. Den. 382 U. S. 864.

The Court is also respectfully referred to the fact the defendant introduced no evidence on the subject of damages. Also, no reversal was sought in the Circuit Court of Appeals for overruling the petitioner's motion for a new trial, thus obviating the only appropriate way to present the question of damages in the Appellate Court.

E. No Grounds Are Set Out for the Exercise of This Court's Supervisory Jurisdiction.

This was an action for the appropriation and use of an invention without compensation when it was disclosed in confidence with the understanding and expectation of compensation should it be used. It is an action well-known historically, *DuPont* v. *Masland*, 244 U. S. 100 (1917), well recognized in Indiana, *Ulman* v. *Thompson*, 57 Ind. App. 126, 106 N. E. 611 (1914), litigated frequently in the Seventh Circuit Court of Appeals, *Smith* v. *Dravo*, 203 F. (2) 369, 208 F. (2) 390 (7th Circuit), *Shellmar Products* v. *Al-*

len Qualley Co., 87 F. (2) 194, 36 F. (2) 623, 31 F. (2) 293 (7th Cir. 1929-36), and well analyzed in the annotations, 170 A. L. R. 449, 153 A. L. R. 983, 85 A. L. R. 1512, 44 A. L. R. 593, 32 A. L. R. 1037, and 16 A. L. R. 117. That there is no conflict among the decisions nor inconsistency with recognized Indiana law is demonstrated by the fact that the petitioner neither cites one 7th Circuit Court case in point nor makes reference to one Indiana case.

The defendant's four cases certainly present no question of great importance in the subject matter of this litigation. Each appeal there demonstrates a situation where the defendant need not proceed with his affirmative defense and testimony because the plaintiff has not made out his case. The exact contrary situation exists here when the burden of proving his second affirmative defense reposes on the defendant, not the plaintiff. As the plaintiff had made out his *prima facie* case long before Mr. Pugh took the stand it is difficult to see how these cases can be authoritative for the direction of a verdict on an affirmative defense supported only by the most interested and biased of testimony. If this were so in criminal cases the state's prosecution would have to fail in each instance where the malefactor denied the act of which he was accused. Certainly, under these circumstances, the degree of Mr. Pugh's interest and bias was appropriate for consideration by the trial court and for the jury.

This Writ of Certiorari is prayed for without referring to one case in point on the facts, completely ignoring all cases relied upon by the Circuit Court of Appeals and without making reference to any of the many cases in point heretofore decided by the Seventh Circuit. Aside from the fact the cases cited by the petitioner are not in point, it is, therefore, difficult to see how the petitioner can contend the District Court and the Circuit Court of Appeals both "* * * so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." Rule 19(1)(b).

No possible important point could be raised on certiorari. The arguments presented have only to do with the weight to be given conflicting evidence by the jury. Perhaps no more can possibly be said on that subject than has already many times before been said by this Honorable Court, the learned commentators and in this instance, by the Seventh Circuit Court of Appeals.

> "* * * where, as here, there is evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion." (Citing from *Lavender* v. *Kurn*, 327 U. S. 645, 653.)

Such has long been the recognized and appropriate Indiana rule correctly applied by the Circuit Court of Appeals in this instance. Certiorari here would simply once again review the facts, already reviewed some five or six times, and lead this Court to the conclusion that the jury reached a determination entirely within its prerogative.

The only question, therefore, has to do with either the weight or credibility of the witnesses and in no way permanently affects either the General Electric Company or the industry as a whole. The re-determination of this case is a re-determination only of the rights between Grepke and the General Electric Company and serves no useful purpose for future litigation or judicial guidance.

WHEREFORE, respondents respectfully pray that the petition for writ of certiorari be denied, and for all other relief proper in the premises.

Respectfully submitted,

SOL. ROTHBERG,
1700 Lincoln Bank Tower,
Fort Wayne 2, Indiana,
Attorney for Plaintiff-Appellee.

THOMAS D. LOGAN,
ALBERT L. JEFFERS,
Of Counsel.